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City of Phoenix and Officer Jason Gillespie

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Martha Winkler, a single woman,

Plaintiff,

v.

City Of Phoenix, a public entity, et al.,

Defendants.

NO. CV-15-01786-PHX-PGR

**DEFENDANTS' ANSWER TO
PLAINTIFF'S SECOND AMENDED
COMPLAINT (Doc. #12)**

For their Answer to Plaintiff's Second Amended Complaint ("SAC"), Defendants City of Phoenix ("City") and Officer Jason Gillespie ("Officer Gillespie") (collectively, "Defendants") admit, deny, and allege as follows. Defendants deny each and every, all and singular, of the allegations in the SAC that are not hereinafter expressly admitted or otherwise pled to.

JURISDICTION & VENUE

1. Paragraph 1 of Plaintiff's SAC does not state an allegation against Defendants and/or calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

2. In answering paragraph 2 of Plaintiff's SAC, Defendants admit only that Plaintiff served a Notice of Claim on the City on January 12, 2015, and that such claim is deemed denied pursuant to A.R.S. § 12-821.01(E). In so admitting, however, Defendants make no admissions regarding the Notice's compliance with A.R.S. § 12-821.01, or the

1 viability of Plaintiff's claims, both of which are expressly denied. Defendants
2 affirmatively allege that Plaintiff has failed to comply with A.R.S. § 12-821.01 with
3 regard to Officer Gillespie.

4 3. In answering paragraph 3 of Plaintiff's SAC, Defendants admit that this
5 Court has jurisdiction over Plaintiff's state and federal law claims. In so admitting,
6 however, Defendants make no admissions regarding the viability of Plaintiff's claims,
7 which is expressly denied.

8 4. In answering paragraph 4 of Plaintiff's SAC, Defendants admit the
9 allegations contained therein. In so admitting, however, Defendants make no admissions
10 regarding the viability of Plaintiff's claims, which is expressly denied.

11 **PARTIES**

12 5. In answering paragraph 5 of Plaintiff's SAC, Defendants reallege and
13 incorporate the allegations in response to paragraphs 1-4 as though fully set forth herein.

14 6. In answering paragraph 6 of Plaintiff's SAC, Defendants admit only that
15 Officer Gillespie was an employee of the City of Phoenix and an officer in the Phoenix
16 Police Department at the time of the incident alleged in Plaintiff's SAC. Defendants
17 affirmatively allege that the City of Phoenix is a municipal corporation organized and
18 existing under the laws of the State of Arizona and therefore entitled to all of the
19 privileges and immunities granted therein, and that the Phoenix Police Department is an
20 agency of the City of Phoenix organized and existing under the laws of the State of
21 Arizona. The remaining allegations in Paragraph 6 call for a legal conclusion to which no
22 response is required. To the extent a response is required, Defendants deny the same.

23 7. Paragraph 7 of Plaintiff's SAC does not state an allegation against
24 Defendants and/or calls for a legal conclusion to which no response is required. To the
25 extent a response is required, Defendants deny the allegations contained therein.

26 ///

FACTUAL BASIS OF CLAIM

Introduction

8. In answering paragraph 8 of Plaintiff's SAC, Defendants reallege and incorporate the allegations in response to paragraphs 1-7 as though fully set forth herein.

9. Paragraph 9 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

10. Paragraph 10 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

11. In answering paragraph 11 of Plaintiff's SAC, Defendants admit only that Defendant Gillespie responded to the Circle K at the corner of Bethany Home Road and Seventh Street in Phoenix in response to various calls, including Plaintiff's 911 calls. Defendants deny the remaining allegations in Paragraph 11.

12. In answering paragraph 12 of Plaintiff's SAC, Defendants deny the allegations contained therein.

13. In answering paragraph 13 of Plaintiff's SAC, Defendants deny the allegations contained therein.

Damages

14. In answering paragraph 14 of Plaintiff's SAC, Defendants deny the allegations contained therein.

15. Paragraph 15 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

16. In answering paragraph 16 of Plaintiff's SAC, Defendants deny the allegations contained therein.

17. Paragraph 17 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required,

Defendants deny the allegations contained therein.

18. Paragraph 18 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

19. Paragraph 19 of Plaintiff's SAC does not state an allegation against Defendants, such that no response is required. To the extent a response is required, Defendants deny the allegations contained therein.

FIRST CLAIM FOR RELIEF

Gross Negligence—City of Phoenix

20. In answering paragraph 20 of Plaintiff's SAC, Defendants reallege and incorporate the allegations in response to paragraphs 1-19 as though fully set forth herein.

21. In answering paragraph 21 of Plaintiff's SAC, Defendants admit only that Officer Gillespie was an employee of the City of Phoenix at the time of the incident alleged in Plaintiff's SAC. Defendants deny the remaining allegations in Paragraph 21.

22. In answering paragraph 22 of Plaintiff's SAC, Defendants admit only that Officer Gillespie was an employee of the City of Phoenix at the time of the incident alleged in Plaintiff's SAC. Defendants deny the remaining allegations in Paragraph 22.

FOURTH CLAIM FOR RELIEF¹

Officer Gillespie Violated Ms. Castillo's [sic] Rights under the Fourth Amendment and 42 U.S.C. § 1983 to be Free from the Unreasonable Use of Force

37. In answering paragraph 37 of Plaintiff's SAC, Defendants reallege and incorporate the allegations in response to paragraphs 1-22 as though fully set forth herein.

38. In answering paragraph 38 of Plaintiff's SAC, Defendants deny the allegations contained therein.

39. In answering paragraph 39 of Plaintiff's SAC, Defendants deny the

¹ Defendants filed a Motion to Dismiss the Second and Third Claims for Relief concurrently with this Answer.

1 allegations contained therein.

2 40. In answering paragraph 40 of Plaintiff's SAC, Defendants deny the
3 allegations contained therein.

4 41. In answering paragraph 41 of Plaintiff's SAC, Defendants deny the
5 allegations contained therein.

6 **JURY TRIAL**

7 42. Defendants also request a trial by jury.

8 **PRAYER FOR RELIEF**

9 Defendants deny that Plaintiff is entitled to any and all relief requested in
10 Plaintiff's Request for Relief.

11 **AFFIRMATIVE DEFENSES**

12 Defendants set forth the following defenses as separate and alternative defenses to
13 Plaintiff's Second Amended Complaint ("SAC"). Some of the defenses outlined below are
14 true affirmative defenses (on which Defendants would bear the burden of proof). Other
15 defenses are outlined for the purpose of placing Plaintiff on notice of the legal defenses
16 Defendants will assert for the purpose of allowing Plaintiff to fully evaluate her claims, as
17 this relates to any future request by Defendants for attorneys' fees for any claim that is
18 subject to dismissal by the Court:

19 1. Plaintiff's SAC, in whole or in part, fails to state a claim upon which relief
20 can be granted.

21 2. Plaintiff failed to comply with A.R.S. § 12-821.01, the Notice of Claim
22 statute, specifically as it relates to service on Officer Gillespie, such that Plaintiff is
23 precluded from alleging any state law claims against Officer Gillespie in his capacity as a
24 Phoenix Police Officer.

25 3. Plaintiff may have failed to comply with A.R.S. § 12-821.01, the Notice of
26 Claim statute, specifically as it relates to the facts supporting the damages claims.
27 Whether or not Plaintiff possessed additional facts that should have been included will
28 only be determined through the discovery process.

1 4. Plaintiff has failed to comply with A.R.S. § 12-821.01, the Notice of Claim
2 statute, with regard to any fictitious or “unidentified individuals” referenced in the SAC,
3 such that Plaintiff is precluded from alleging any state law claims against such individuals
4 in their capacities as City employees.

5 5. Defendants are entitled to all privileges and immunities afforded to
6 governmental employees and/or entities under state and federal law, including, but not
7 limited to, those privileges and immunities provided in A.R.S. § 12-820, et seq. and
8 qualified immunity as defined in *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overruled on
9 other grounds by *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

10 6. At all times set forth in the SAC, Defendants were acting reasonably, in
11 good faith, without malice, and based upon probable cause and/or reasonable suspicion.

12 7. There existed no conduct by Defendants that was driven by evil motive or
13 intent, nor conduct that was reckless or callously indifferent to Plaintiff’s constitutional
14 rights, thereby precluding recovery of punitive or exemplary damages.

15 8. Defendants are not liable to Plaintiff for punitive damages pursuant to
16 A.R.S. § 12-820.04.

17 9. At all times set forth in the SAC, Defendants’ actions were objectively
18 reasonable under the totality of the circumstances then existing.

19 10. Plaintiff was solely or comparatively at fault for the injuries and damages
20 alleged in the SAC, thereby barring or reducing any recovery herein by way of
21 comparative negligence. This fault includes, but is not limited to, Plaintiff’s attempts to
22 pull away from Officer Gillespie and otherwise resist arrest in a busy parking lot.

23 11. The actions or inactions alleged on the part of Defendants were not the
24 proximate cause of any injuries, losses, and/or damages to Plaintiff, thereby barring
25 recovery herein or reducing Plaintiff’s recovery in proportion to the fault assessed against
26 Plaintiff and/or any third parties who may be all or partially at fault.

27 12. Plaintiff’s alleged injuries, if any, were proximately caused by an
28 independent intervening/superseding cause for which Defendants are not liable.

1 13. Plaintiff's injuries, if any, were caused by a third party over whom
2 Defendants had no control.

3 14. Plaintiff's injuries, losses, and damages, if any, were the result of the
4 negligence or intentional act of someone other than Defendants, thereby reducing or
5 eliminating any damages owed by Defendants.

6 15. Plaintiff may have failed to mitigate her damages, thus barring or reducing
7 the recovery against Defendants.

8 16. Plaintiff's claimed injuries are the result of a pre-existing condition(s),
9 thereby eliminating any damages owed by Defendants.

10 17. Plaintiff assumed the risk of injury, and was negligent per se, by knowingly
11 remaining unlawfully in or on the Circle K property after being asked to leave. *See* A.R.S.
12 § 13-1503(A).

13 18. Plaintiff assumed the risk of injury, and was negligent per se, by
14 intentionally attempting to prevent Officer Gillespie, who Plaintiff knew to be a peace
15 officer acting under color of his authority as such, from effecting her arrest by using or
16 threatening to use physical force, using any other means to create substantial risk of
17 causing physical injury, and/or passive resistance. *See* A.R.S. § 13-2508(A).

18 19. Plaintiff assumed the risk of injury, and was negligent per se, by contacting
19 or communicating with Circle K customers by verbal means in a manner that harasses and
20 with intent to harass or knowledge that she was harassing such persons. *See* A.R.S. § 13-
21 2921(A).

22 20. Plaintiff assumed the risk of injury, and was negligent per se, by failing or
23 refusing to state her true full name on request of Officer Gillespie, a peace officer who
24 had lawfully detained her based on reasonable suspicion that she had committed a crime.
25 *See* A.R.S. § 13-2412.

26 21. Under the circumstances, Officer Gillespie had probable cause to arrest
27 Plaintiff for violation of A.R.S. § 13-1502(A) (third-degree trespass); A.R.S. § 13-
28 1503(A) (second-degree trespass); A.R.S. § 13-2508(A) (resisting arrest); A.R.S. § 13-

1 2921(A) (harassment); and/or A.R.S. § 13-2412(A) (refusing to provide truthful name
2 when lawfully detained).

3 22. Plaintiff is currently being prosecuted for violation of A.R.S. § 13-1502(A)
4 (third-degree trespass). To the extent she is convicted, Plaintiff's unlawful seizure claim is
5 barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

6 23. Officer Gillespie's use of force in effecting Plaintiff's arrest was justifiable
7 and not criminal or wrongful pursuant to A.R.S. § 13-403(4).

8 24. Plaintiff's use of physical force in resisting arrest was not justified pursuant
9 to A.R.S. § 13-404(B).

10 25. Officer Gillespie's use of force in effecting Plaintiff's arrest was justified
11 pursuant to A.R.S. § 13-409.

12 26. Defendants are not liable for Plaintiff's injuries pursuant to A.R.S. § 12-711.

13 27. Defendants are not liable for Plaintiff's injuries pursuant to A.R.S. § 12-
14 712(B).

15 28. Plaintiffs may not assert a simple negligence claim against Defendant under
16 *Landeros v. City of Tucson*, 171 Ariz. 474 (App. 1992), as Defendants are entitled to
17 qualified immunity for arrest-related activities pursuant to A.R.S. § 12-820.02(A)(1),
18 which requires a showing of gross negligence or intent to cause injury to Plaintiff.

19 29. Neither Defendants' actions nor inactions violated Plaintiff's constitutional
20 rights or Plaintiff's rights under federal or state law.

21 30. Plaintiff cannot establish the requisite showing of subjective intent
22 necessary to sustain a cause of action alleging a constitutional violation, thereby
23 warranting dismissal of this lawsuit.

24 31. Defendants put Plaintiff on notice that further affirmative defenses may be
25 added in an amended answer after discovery. These defenses may include any defense set
26 forth in Rule 8(d) and/or Rule 12(b) of the Federal Rules of Civil Procedure or as
27 otherwise allowed by law.

28 32. Defendants demand a jury trial.

1 WHEREFORE, Defendants respectfully request that:

2 A. Plaintiff's Second Amended Complaint be dismissed with prejudice, and
3 that Plaintiff take nothing therein;

4 B. Defendants be awarded their costs, expenses, and attorney fees pursuant to
5 A.R.S. § 13-420 and 42 U.S.C. § 1988; and

6 C. Defendants be awarded such other and further relief as this Court deems just
7 and equitable.

8 DATED this 4th day of December 2015.

9 STRUCK WIENEKE & LOVE, P.L.C.

10 By /s/ Jacob B. Lee

11 Kathleen L. Wieneke

12 Jacob B. Lee

13 Struck Wieneke & Love, P.L.C.

14 3100 West Ray Road, Suite 300

15 Chandler, Arizona 85226

16 Attorneys for Defendants

17 City of Phoenix and Officer Jason Gillespie

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on December 4, 2015, I electronically transmitted the attached
20 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
21 Notice of Electronic Filing to the following CM/ECF registrants:

22 Jocquese L. Blackwell
23 BLACKWELL LAW OFFICE
24 111 West Monroe St., Suite 1216
25 Phoenix, AZ 85003
26 Attorney for Plaintiff

27 I hereby certify that on this same date, I served the attached document by U.S.
28 Mail, postage prepaid, on the following, who is **not** a registered participant of the
CM/ECF System:

N/A

/s/ Jacob B. Lee